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THE ADMINISTRATION OF CRIMINAL JUSTICE IN WISCONSIN.

JUDGE E. RAY STEVENS.¹

It is a matter of common knowledge that there is an already widespread and increasing dissatisfaction with the administration of the criminal law in this country. It is charged that society is not adequately protected and that the system of administering punitive justice is ineffective as a corrective system; that courts are defectively organized; that procedure is cumbersome and costly; that excessive emphasis is laid on technicalities, affording an undue advantage to the lawbreaker of means, and deepening the erroneous impression that there is one law for the rich and another for the poor; that the lax enforcement of laws and the frequent abortive attempts to punish wrongdoers is breeding a growing contempt for law and order. These are charges that cannot go uninvestigated, for the power of the courts is measured by the confidence which the people have in their justice and integrity. Without this confidence, the courts are powerless to enforce their decrees. When the people lose confidence in the courts, resort is had to lynch law and vigilance committees. Each man becomes a law unto himself. Society reverts to barbarism.

In such conferences as this we may investigate these charges. If they are well founded, we may find and remove the conditions that lead to their making. If criminal justice is not guilty of these charges, it should be acquitted, so that the confidence of the people in the impartiality and efficiency of the administration of the criminal law may be restored.

It was not until June, 1909, that any organized effort was made to investigate these charges. In that month the American Institute of Criminal Law and Criminology was organized at Chicago. This Institute is carrying forward for the nation as a whole the work which the Wisconsin Branch is doing in this state. In its JOURNAL and its bulletins and in the reports of its committees is found the first systematic study of the administration of criminal justice in America.

But the work of these conferences is not confined to investigation. It is their purpose to direct attention to the questions connected with

¹Of the Circuit Court, Madison, Wis., and president of the Wisconsin Branch of the American Institute of Criminal Law and Criminology. Read before the second annual meeting of the Branch at Milwaukee, November 25, 1910.

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the administration of the criminal law by diffusing the knowledge gained through their investigations, so that public opinion may be led to demand an improvement in the existing system of criminal law and procedure. That past efforts have not been in vain is shown by the fact that an opinion recently filed in the Supreme Court referred to our first conference held at Madison a year ago as "a flame in whose light we are now administering the criminal law." (Timlin, *J. Hack v. State*, 141 Wis. 346, 355.)

The reports of your committees have outlined the work of this conference. I conceive it to be the duty of your president to leave the discussion of these reports to the conference, and to confine myself to presenting to you briefly the record made by the courts of Wisconsin during the past year, so far as that record relates to the improvement of the administration of punitive justice in Wisconsin. There are other phases of the record of the past year that are worthy of presentation. But I confine myself to this field because it is the one with which I am more familiar, leaving the discussion of other topics to those who have wider knowledge. The past year has been distinguished by the number of criminal cases in which the Supreme Court has brushed aside so-called technicalities and decided them on their merits. In no previous year of its history has the court done so much to bring its decisions into harmony with the spirit and the letter of the code of reform procedure adopted more than fifty years ago.

To understand why it has taken a half-century to bring ourselves into harmony with the spirit of the code, we must turn the pages of history back to the convention that framed our constitution. It is the 21st day of February, 1848. L. P. Harvey, later governor of Wisconsin, a delegate to that convention, is speaking. He says: "A broad and barren waste of technicalities and legal fictions, the labyrinths of which can never be threaded by the uninitiated, separates between the people and justice, and the party seeking a remedy at law, like the adventurer in search of the magnetic poles of the earth, brings back no result of his weary search, save the journal of the route he has traveled, the dangers he has avoided, and perhaps a chart laying down the rock on which he finally made shipwreck. For these he pays his fortune, his prospects and his hopes, for no benefit save to the profession who make such matters their study."

These words were spoken during an argument for the adoption of that section of the constitution which makes it the duty of the legislature at its first session to appoint three commissioners "to inquire into, revise and simplify the rules of practice, pleadings, forms and proceedings" in our courts. (Const., Art. VII, Sec. 22.) That section became a part of the constitution. The legislature appointed the three com-

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missioners; the commissioners drafted the code, and the code was adopted by the legislature. Governor Harvey, long before his untimely death, must have realized that something more than a constitution and a code was required to lead the lawyers and judges trained in the technicalities of the common law practice and procedure to appreciate how fully the rigors of the common law had been softened by the spirit of the code. (125 N. W. 907.)

The reformed procedure was received rather coldly by many, especially the older practitioners and judges. (141 Wis. 358.) They imported into the liberal provisions of the code the technical rules of the common law in which they were schooled. They considered themselves bound by what Mr. Justice Timlin has well styled "a sort of verbal logic" derived from former sayings of courts. "This self-inflicted spell" would be "amusing, were its consequences not so serious." (117 N. W. 1030.)

The story of how the code has emancipated our courts from "the thralldom of useless technicalities" (141 Wis. 360), as written in the decisions of the Supreme Court, is one that is intensely interesting, but too long to be told at this time. Nor is that story all told. As Mr. Justice Marshall well said last year: "We do not to this day fully appreciate the great judicial revolution intended by it, rendering justice more certain, more speedy and more economical of attainment. Appreciation of the intended change has come about so slowly that after fifty-three years we are quite far from fully comprehending its beneficent purpose." (141 Wis. 358-9.) Since the justices now sitting on the supreme bench became members of the court, that tribunal has done more than in all the previous history of the state, to bring the administration of both civil and criminal justice into harmony with the guiding thought of the framers of the code, that the attainment of justice, the end to be sought in all litigation, should be freed entirely from all mere technicalities, not affecting substantial rights.

This progress has not been achieved by abandoning the compass and sailing boldly out on an uncharted sea, but by adhering "to the spirit of the law which giveth life, rather than to the letter which killeth" (141 Wis. 353), by recognizing that in the attainment of justice, the ever changing conditions of society often require "a new application of an old principle; that under such circumstances the court should not stop before reaching the legitimate goal, for the want of a precedent, but that a new one should be made in order to satisfy the fundamental principles of justice." (123 N. W. 256.) The adoption of such a rule does not mean that "the rights of a defendant in a criminal case should not be jealously and scrupulously guarded and protected by the courts." But

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it does mean that a person accused of crime should not be "turned loose on mere technicalities which in no way involve the merits of the case. Such maladministration of our criminal laws should not be encouraged nor tolerated." So declared Mr. Justice Barnes, speaking for the united court, in a decision rendered last month, October, 1910 (127 N. W. 958.) In the progress of the past year the legislature has been the faithful handmaiden of the courts; and the court has declared that it "is glad to welcome legislative assistance and approval." (141 Wis. 353.)

There has been much criticism of the administration of criminal justice because persons believed to be guilty of the offenses charged against them have escaped punishment on some purely technical objection to the proceedings which in no way affected the substantial rights of the accused. No matter how erroneous the ruling of the trial court, that ruling resulted in the discharge of the accused, for the prosecution could not review it in the Appellate Court. As the defendant played with loaded dice, it was inevitable that he should win where justice administered with even hand required that he should lose.

Two years ago, when the justice of this old rule was challenged by the newly elected governor of Wisconsin, then acting as district attorney of Milwaukee County, the Supreme Court made the first inroad upon the rule by granting the imperative writ of mandamus to compel the Circuit Court to proceed with the trial of one under indictment, where that court had sustained a purely technical objection to the grand jury, which the Appellate Court found to be without merits. (136 Wis. 1.) But the prosecution had no right to review rulings which involved the merits of the case until that power was conferred by the last legislature. (Ch. 224, laws of 1909.) Under that act the prosecution may review rulings made by the trial court before jeopardy has attached.

The first case which the prosecution took to the Supreme Court under this statute was decided last month. (*State v. Brown*, 127 N. W. 956.) This case well illustrates the change which this law will make in the administration of criminal justice. The indictment charged that the defendant by the use of false pretenses induced "Marinette County to pay" to him a certain sum of money. The defendant urged that this did not charge an offense against him because the words "induce to pay" do not charge that the defendant received the money or that the county parted with it, inasmuch as "induce may well mean to persuade, to convince or to tempt, and that the defendant might tempt, persuade or convince the county that it should pay the money in question, but that, until he actually received it, no crime was committed." The defendant supported his contention with decisions from the Appellate courts of five states (Mass.,

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Mo., Fla., Kan. and Ohio), and the "trial court with considerable reluctance concluded to follow the decided cases." (127 N. W. 957.) The Supreme Court refused to sanction this technical construction of the language used and sent the case back for trial on its merits. Under the rule that formerly prevailed the defendant would have been discharged, whether guilty or innocent, because the prosecution could not review any adverse ruling of the trial court. Under this decision the rights of the defendant are fully protected. As pointed out by the Supreme Court, if he did not obtain the money "he has a perfect defense * * * and is not deprived of any right to avail himself of such defense." (127 N. W. 958.) This law, if amended so as to require technical objections to be made before jeopardy attaches, will effectually dispose of one of the most prolific causes of dissatisfaction with the administration of the criminal law in this state.

One fruitful source of delay in the administration of criminal justice has been the granting of new trials for errors which are not shown to have affected the substantial rights of the accused. Under a rule that was long recognized in this state, the court presumed that any error committed on the trial was prejudicial to the accused and set aside the conviction, unless it appeared "so clear as to be beyond doubt that error challenged did not prejudice and could not have prejudiced the complaining party." (118 Wis. 67.)

While under the provisions of the code (Sec. 2829 of the statutes) the general trend of the decisions of our court has been away from this rule, yet it found occasional recognition in its opinions in recent years. The legislature of 1909 challenged judicial attention anew to the spirit of the code by passing an act (Ch. 192, laws of 1909) which puts upon the complaining party the burden of establishing the fact that the error complained of has affected his substantial rights. Otherwise there can be no reversal of the judgment. Since the passage of this act the Supreme Court has declared: "This court will loyally stand by this law, and will earnestly endeavor to administer it so as to do equal and exact justice so far as human effort can accomplish that end." (141 Wis. 353.)

Let me give a single illustration of the effect of the change of this rule. In 1882 a man named Jackson was convicted of burglary in the Municipal Court of Milwaukee County. The state had proved that the house burglarized was owned by a Mr. Drake, but it had failed to establish the fact alleged in the information that his given name was William. Although the Supreme Court held that, outside of the proof as to this given name, the evidence was sufficient to sustain the conviction, yet in view of the fact that "there might have been several persons in the county

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of Milwaukee by the name of Drake," the judgment must be reversed and a new trial ordered (55 Wis. 592), forsooth, because the court presumed that the defendant had been prejudiced by the failure to prove Mr. Drake's given name. Were that case presented to the Supreme Court to-day the conviction would be affirmed, unless the defendant could show "as a fair inference of fact" that the failure to prove that Mr. Drake was christened William had affected his substantial rights.

By legislative act and by judicial approval it is the settled law of this state that no conviction will henceforth be set aside, unless it appear "as a fair inference of fact" that the error committed did in fact prejudice the substantial rights of the accused. (126 N. W. 745.) Perhaps no other rule has led to so many reversals of convictions and consequent delays in the administration of criminal justice as this one which fortunately is now of interest to us only in so far as it forms a part of the history of the jurisprudence of Wisconsin.

Prior to January of this year (1910) it had been the rule in Wisconsin that any person convicted of crime, after a fair and impartial trial, could have that conviction set aside by showing that before the trial was begun he was not asked whether he pled guilty or not guilty." The fact that he, by going to trial, challenged the state to prove his guilt; that he may have produced witnesses who testified to his innocence; that he may have employed lawyers to establish that fact, or that he himself may have testified under oath that he did not commit the crime, did not change the rule that the conviction must be set aside unless he was asked to plead.

I know of no better presentation of the reasons why this and similar technical rules should no longer prevail than that found in the opinion written by Chief Justice Winslow in *Hack v. State* (141 Wis. 346, 351), decided January 11, 1910. I shall therefore beg your indulgence to quote from that opinion. The safeguards which are thrown around persons accused of crime had their origin, he said, "in those days when the accused could not testify in his own behalf, was not furnished counsel, and was punished, if convicted, by the death penalty or some other grievous punishment out of all proportion to the gravity of his crime. Under such circumstances, it was well, perhaps, that such a rule should exist, and well that every technical requirement should be insisted on, when the state demanded its meed of blood. Such a course raised up a sort of barrier which the court could utilize when a prosecution was successful which ought not to have been successful, or when a man without money, without counsel, without ability to summon witnesses, and not permitted to tell his own story, had been unjustly convicted. * * *

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"Thanks to the humane policy of the modern criminal law, we have changed all these conditions. The man now charged with crime is furnished the most complete opportunity for making his defense. He may testify in his own behalf; if he be poor, he may have counsel furnished him by the state, and may have his witnesses summoned and paid for by the state; not infrequently he is thus furnished counsel more able than the attorney for the state. In short, the modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation. The reasons which in some sense justified the former attitude of the courts have therefore disappeared, save perhaps in capital cases, and the question is, Shall we adhere to the principle based upon conditions no longer existing? No sound reason occurs to us why a person accused of a lesser crime or misdemeanor, who comes into court with his attorney, fully advised of all his rights and furnished with every means of making his defense, should not be held to waive a right or privilege for which he does not ask, just as a party to a civil action waives such a right by not asking for it.

"Surely the defendant should have every one of his constitutional rights and privileges, but should he be permitted to juggle with them? Should he be silent when he ought to ask for some minor right which the court would at once give him, and then when he has had his trial, and the issue has gone against him, should he be heard to say there is error because he was not given his right? Should he be allowed to play his game with loaded dice? Should justice travel with leaden heel because the defendant has secretly stored up some technical error not affecting the merits, and thus secured a new trial because, forsooth, he can waive nothing? We think not. We think that sound reason, good sense, and the interests of the public demand that the ancient strict rule, framed originally for other conditions, be laid aside, at least so far as all prosecutions for offenses less than capital are concerned."

Mr. Justice Timlin, "reluctant to proceed so radically and so rapidly along the path of reform," hesitates to concur in this opinion. Like the boy who stands at the old swimming pool for the first time after the coming of the May days, he calls upon the legislature to take the first plunge. Realizing that the technical rules that have held sway for so many long years are about to pass to the great beyond, he writes:

"Now it may be that these precedents deserved this fate. They perhaps deserved death in order that we all might live. They were certainly guilty of being old. They were not innocent of having been born at the wrong time. They perhaps distracted the circuit judges in

the consideration of fine scholastic distinctions concerning lack of ordinary care by intruding upon them some rude, practical experience in the exercise of ordinary care. Like primeval man before his fall, unconscious of sin, they neglected to cover themselves with foliage. They obtruded their classical clearness and simplicity against the turgid top loftiness which closed the nineteenth and began the twentieth century. They failed to stand for any corporate privilege or advantage. For all this they perhaps deserved amortization. But before Oblivion's curtain falls upon them forever, let me say that in my youth, before professional success and competence and a seat on the supreme bench had their value impaired by realization, and while such things were bright with the glamour of anticipation, those precedents seemed to me profound in their wisdom, unimpeachable in their authority, and clear, definite, and correct in their doctrine. Mentors of my brighter days, farewell." (141 Wis. 356.)

It has been my purpose to present the record of the achievement of the past year, rather than to detail unsolved problems. For fear you may draw the conclusion that the courts have attained perfection in the administration of punitive justice, your attention should be directed to the fact that there is something for this conference to consider in connection with the administration of the criminal law in these tribunals.

Three or four years ago a defendant was on trial for wife abandonment before a jury of twelve in Fond du Lac County. During the trial one of the jurors disappeared. As he could not be found by the officers, the defendant consented in open court that the case be submitted to the eleven that remained. He was convicted. He carried the case to the Supreme Court, where he presented the single question, that the judgment must be set aside because he could not consent to be tried by eleven instead of twelve jurors. A majority of that court, considering themselves bound by the strict rule of the earlier cases, reversed the judgment. In a dissenting opinion Mr. Justice Marshall said:

"I cannot escape the conclusion that the decision from which I now dissent is a backward step, liable to seemingly afford some justification for the idea that the court is prone to hinge reversals upon mere technicalities." (134 Wis. 314.)

In the case just referred to the majority of the court suggest that, if the rule is to be changed, it should be through appropriate legislative action. (134 Wis. 310.) Twenty-five years ago the Supreme Court affirmed the right of the legislature to provide that the accused might waive a jury trial in the particular court created by the act which contained that provision. (*In re Staff*, 63 Wis. 285.) This conference

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should consider whether it ought not to ask the legislature to change the public policy of this state by empowering the accused in all criminal cases to waive a trial by a jury of twelve men.

Throughout the history of the state the convicted man has been allowed to play with loaded dice when he sought to reverse that conviction in the Supreme Court, well knowing that, if a new trial was granted, he could not be convicted of a more serious offense than that of which he has been adjudged guilty, while he might be acquitted entirely or found guilty of some lesser offense if that be included in or constituted a part of the one of which he was found guilty. Recent decisions of the Supreme Court tend to extend rather than to limit the application of this rule as to jeopardy, which seems to be out of harmony with the spirit of the code as it has found expression in the decided cases. (*Schultz v. State*, 135 Wis. 644.)

Our English cousins, proceeding at each step with proper regard for the rights of the accused, pursued Doctor Crippen across the Atlantic, took him back to England, bound him over for trial, tried and convicted him, disposed of his appeal from that conviction and visited the punishment prescribed for the offense of which he was found guilty within less time than it takes to prepare for a trial of equal importance on this side of the water. The entire time of the English courts taken up by this case was less than that consumed in some American courts in recent years in selecting a jury to try one accused of crime.

We preserve the right to be tried by a jury of the county in which the offense was committed, and then spend weary hours and even days in carefully excluding every juror that possesses even the slightest tinge of a suspicion of knowledge that would have qualified him to act as a juror in the days when the rule was established requiring jurors to come from the vicinity in order that they might have a knowledge of the facts that would enable them to decide the case justly.

It is not my purpose to catalog these shortcomings of the courts, but rather to assure you that you need not approach their doors with heavy hearts, feeling that within you will find no new worlds to conquer.

As we study the administration of punitive justice, whether it be in the court, or in the police station, the jail and the examining magistrate's office, or in the institution to which the accused passes after conviction, we shall find questions of grave importance to society to occupy the attention of this and succeeding conferences. The work of the Wisconsin Branch will not be closed until these problems have been investigated and their solution found.